CHOOSING ARBITRATION AND THE RIGHT ARBITRATOR

If you are involved in a contractual dispute and are canvassing your options, you need to know that the Superior trial courts in Canada's larger cities have experienced a severe funding shortage for years that delays construction of new courts, and the appointment of service personnel and trial judges. Thanks to our constitution, the federal government appoints Superior Court judges from the trial level, to the Provincial Court of Appeal, and to the Supreme Court of Canada. And it is the provinces that get to pay all the bills.

Because the responsibility for appointing judges and paying for infrastructure and salaries is divided, the simple fact is that the judicial system, much like a machine that needs oiling is grinding to a halt. So it is not unusual for litigants to experience 5 to 7 year waits for law suits to make it to trial. And that does not even begin to take into account the added delay if one or another party who loses at trial decides to take its chances on an appeal to the Court of Appeal of his Province. So add at least a year if not more before the appeal is disposed of, assuming that no one decides to ask for leave to appeal to the Supreme Court of Canada.

In the meantime, if the business relationship between the parties is damaged not so much by the facts of their particular dispute but more so by the lack of a decision that ends the conflict, not only do their legal costs build but so do their opportunity costs assuming that they still want to be involved in other deals. The simple fact is that businesses regularly find themselves in conflict. That does not mean that they want to follow a 'scorched earth' policy. And all because the judicial system is so short of funds that it cannot efficiently service the public's need for adjudication.

If you find that depressing, and it is, don't lose hope. Private arbitration is available that allows parties to bypass the courts. What is important are the following considerations. Every Canadian province has at last one arbitration statute that contains procedural protections for parties who elect to arbitrate. And those run the gamut from recognition and enforcement of parties' rights to arbitrate; to appointment of arbitrators;

to removal of arbitrators for cause; to establishment of a formal process for parties and their lawyers to meet, plan and schedule every aspect of the arbitration including the exchange of relevant documents and timing of the arbitration hearing.

Provided that the parties insist that their lawyers approach the arbitration process expeditiously, the costs of arbitration including sharing of the arbitrators bills can be a fraction of the amount they are likely to spend on endless litigation not to mention the time spent from beginning to end.

It's important to understand that there are three fundamental factors that allow parties to reach the goal line, quickly and cost effectively. The first is to choose arbitrators who understand the subject matter of the dispute. The second is for parties to demand that their lawyers do not treat arbitration processes as though they were in court. Otherwise they might just as well join the overcrowded line up for the courts. And the third is to choose no nonsense arbitrators who value brevity, efficiency, and straight forward communication.

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JACK ZWICKER